UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

MAURA O'SHEA,

Plaintiff,

v. No. 01-CV-1264 (DRH)

CHILDTIME CHILDCARE, INC., d/b/a Childtime Children's Centers; and JEAN CLEVEANGER,[1]

Defendants.

APPEARANCES: **OF COUNSEL:**

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JAMES A. RESILA, ESQ.

DAVID R. HOMER
U.S. MAGISTRATE JUDGE

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[1]As spelled in the caption of the Amended Complaint. Docket No. 5. It appears, however, that the correct spelling of defendant's name is "Cleavenger." See, e.g., Cleavenger Dep. (Docket No. 19, Ex. C). This spelling will be used herein.

MEMORANDUM-DECISION AND ORDER

Plaintiff Maura O'Shea ("O'Shea") brought this action alleging that her employment by defendant Childtime Childcare, Inc. ("Childtime"), a daycare provider, was terminated for opposing Childtime's policy and practice of prohibiting the hiring of males for positions providing care for pre-school children in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq., and N.Y. EXEC. LAW § 296 (McKinney 2001). Am. Compl. (Docket No. 5). O'Shea also alleges that Childtime failed to notify her of her right to continue health insurance coverage as required by the Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA), 29 U.S.C. §§ 1161-68. Presently pending is defendants' motion for partial summary judgment pursuant to Fed. R. Civ. P. 56(b). Docket Nos. 18-21.[2] O'Shea opposes the motion and cross-moves for summary judgment on all causes of action. Docket Nos. 22-24, 26-27. Defendants oppose O'Shea's cross-motion for summary judgment. Docket No. 25. For the reasons which follow, defendants' motion is denied and O'Shea's cross-motion is granted in part and denied in part.

I. Background

The following facts are presented in the light most favorable to O'Shea as the non-movant on defendants' motion for partial summary judgment. See Ertman v. United States, 165 F.3d 204, 206 (2d Cir. 1999).

Childtime operates daycare centers in seventeen states, including New York. Leahy

[2]Defendants seek summary judgment on O'Shea's discrimination and retaliation claims (Counts I, II, IV and V (misnumbered as "IV") of the amended complaint) but not on her COBRA claim (Count III).

Decl. (Docket No. 22) at Ex. 4. Childtime's Vice-President, Deborah Ludwig, is responsible for the centers located in the eastern half of the United States. Cleavenger Dep. (Docket No. 19, Ex. C) at 14-15. O'Shea was employed by Childtime from 1993 until 1999. O'Shea Dep. (Docket No. 19, Ex. B) at 7, 179. In 1996, O'Shea was promoted from assistant director at the Delmar, New York center to director of the new Clifton Park, New York center. O'Shea Dep. at 16-17, 28. O'Shea's direct supervisor was Childtime's area manager, defendant Jean Cleavenger ("Cleavenger"). Cleavenger Dep. at 6. As center director, O'Shea was responsible for hiring and supervising teachers, marketing the center to increase enrollment and managing the budget. Resila Aff. (Docket No. 19) at Ex. E. On March 1, 1999, Cleavenger gave O'Shea a satisfactory performance review. Resila Aff. at Ex. E. However, Cleavenger instructed O'Shea to bolster enrollment by September 1999 through increased marketing efforts. Resila Aff. at Ex. E.

In or about 1995, an incident occurred at the Delmar center when Ludwig told an employee to transfer a male employee from the toddler room, where the male employee was required to change children's diapers, because "its just a lawsuit waiting to happen." O'Shea Dep. at 22. Ludwig stated that she did not want male staff assigned to the toddler room. Boehm Decl. (Docket No. 22, Ex. 2) at ¶¶ 2, 4. On October 28, 1999, O'Shea hired Mark Murray as a teacher for school-aged children. O'Shea Dep. at 108-09. On November 1, 1999, a parent told O'Shea that she was removing her child from the center because one of the teachers was male. O'Shea Dep. at 107. The parent complained to Cleavenger that O'Shea had been rude and had failed to check the references of the male teacher. Resila Aff. at Ex. I; Cleavenger Dep. at 60-62. Cleavenger directed O'Shea to apologize to the parent and to attempt to bring the parent back as a customer. Cleavenger Dep. at 64.

On November 5, 1999, the Clifton Park center had seventy-nine enrolled children and an enrollment goal of ninety-five children. Leahy Decl. at Ex. 19. The enrollment had recently reduced by eight children due to six relocations, one parent at home on disability and the withdrawal because there was a male teacher. Leahy Decl. at Exs. 17, 18. O'Shea provided Cleavenger this information in a letter which Cleavenger faxed to Ludwig. Cleavenger Dep. at 91; Leahy Decl. at Ex. 18. On November 8, 1999, Cleavenger formally counselled O'Shea. Leahy Decl. at Ex. 21. Cleavenger directed O'Shea to add twenty new enrollments in five weeks while retaining current enrollments other than relocations even though O'Shea was only sixteen children below her enrollment goal. Leahy Decl. at Exs. 19, 20. Cleavenger also canceled O'Shea's previously approved vacation, although the approval was later reinstated. Leahy Decl. at Ex. 21. O'Shea was scheduled for another evaluation in thirty days and was told that her failure to comply with the enrollment goal might result in her termination. Leahy Decl. at Ex. 21.

In early November 1999, O'Shea interviewed Kevin Bryant for a position in the toddler room. O'Shea Dep. at 116. O'Shea scheduled Bryant for a second interview with her assistant, Kelly Charbonneau. O'Shea Dep. at 119-20. O'Shea told Charbonneau to hire Bryant if she liked him and to obtain a wage approval from Cleavenger. O'Shea Dep. at 120-21. O'Shea warned Charbonneau that Cleavenger might not be happy with placing Bryant in a toddler room. Charbonneau Decl. (Docket No. 22, Ex. 22) at ¶ 2 Charbonneau did not hire Bryant because Cleavenger told her that Childtime frowned on placing men in the toddler room. Charbonneau Decl. at ¶ 3. Cleavenger told Charbonneau to inform Bryant that the toddler room position was filled but that an opening existed in the pre-school room even though this was not true. Charbonneau Decl. at ¶¶ 3-4. When O'Shea returned from her

vacation, she was informed that Bryant had not been hired because Cleavenger objected. O'Shea Dep. at 122. O'Shea called Cleavenger to discuss Bryant's hiring and tape recorded the conversation. Leahy Decl. at Ex. 23. In that conversation Cleavenger stated that she was uncomfortable with hiring men for the toddler room, especially in light of O'Shea's recent experience with the parent. Leahy Decl. at Ex. 23, 5-6. On November 29, 1999, O'Shea exercised her discretion to hire Bryant for the toddler room position. Resila Aff. at Ex. O. Cleavenger approved Bryant's pay for the position on December 10, 1999. Resila Aff. at Ex. O.

On December 13, 1999, Cleavenger gave O'Shea a written warning to check all employee references, secure an additional sixteen enrollments in five weeks and charge all reregistration fees. Leahy Decl. at Ex. 34. The warning again informed O'Shea that if she failed, she might be terminated and that there would be a re-evaluation on January 14, 2000. Leahy Decl. at Ex. 34. The next day, O'Shea informed Charbonneau that she was not coming to work and Charbonneou so notified Cleavenger. O'Shea Dep. at 155; Leahy Decl. at Ex. 27. On December 16, 1999, Cleavenger terminated O'Shea's employment at Ludwig's direction, purportedly because O'Shea refused to market the center and because she failed to advise Cleavenger that she was not reporting to work on December 14, 1999. Cleavenger Dep. at 103, Leahy Decl. at Ex. 26.

On February 24, 2000, O'Shea filed a complaint with the New York State Division of Human Rights ("DHR"). Leahy Decl. at Ex. 16. On April 26, 2001, the DHR completed their investigation and found probable cause to support O'Shea's claim that she was terminated for opposing a discriminatory employment practice. Am. Compl. at Ex. B. On June 18, 2001, the Equal Employment Opportunity Commission issued a "right to sue" letter. Am. Compl. at

Ex. C. On July 19, 2001, the DHR dismissed O'Shea's complaint. Am. Compl. at Ex. C. This action followed.

II. Discussion

A. Defendants' Motion to Strike

Defendants move to strike O'Shea's cross-motion for summary judgment for failure to include a statement of material facts. Defendants also move to strike O'Shea's exhibits 2-14, 16 and 22.

1. Statement of Material Facts

Defendants contend that O'Shea failed to include a statement of material facts with her cross-motion for summary judgment and, thus, her motion must be denied pursuant to N.D.N.Y. L.R. 7.1(a)(3). O'Shea submitted a response to defendants' statement of material facts. Docket Nos. 23, 27. O'Shea believed that this was sufficient to satisfy the local rules requirement of filing a responsive statement of material facts and a statement of material facts in support of her cross-motion for summary judgment. Leahy Decl. II (Docket No. 26) at ¶ 3. O'Shea's statement of material facts will be considered both as a response to defendants' statement of material facts and in support of her cross-motion for summary judgment. See Meaney v. CHS Acquisition Corp., 103 F. Supp. 2d 104, 108 (N.D.N.Y. 2000) (Kahn, J.) (statement of material facts did not indicate if it was responsive or in support of the cross-motion and, thus, the statement constituted both a response and support). Defendants' motion to strike on this ground is denied.

2. Unsworn Declarations

Defendants contend that the declarations of Linda Boehm and Kelly Charbonneau should not be considered because they were unsworn declarations. Under 28 U.S.C. § 1746, a court may consider a signed statement if the statement was signed under the penalty of perjury. Hameed v. Pundt, 964 F. Supp. 836, 840 (S.D.N.Y. 1997). Both the Boehm and the Charbonneau declarations were signed and contained the statement, "I declare under penalty of perjury that the foregoing is true and correct." Leahy Decl. at Exs. 2, 22. Thus, both declarations are sworn and may be considered. Defendants' motion to strike on this ground is denied.

3. Self-Serving Letters

Defendants contend that O'Shea submitted irrelevant self-serving letters in opposition to their motion and, thus, that O'Shea's exhibits three through fourteen should not be considered. These exhibits are authenticated only by O'Shea's counsel. See Leahy Decl. at ¶ 28. There is no demonstration that O'Shea's counsel had personal knowledge of the authenticity of these documents as required by Fed. R. Civ. P. 56(e). Defendants' motion to strike on this ground is granted.

4. DHR Findings

Defendants contend that the DHR findings are inadmissible because they were generated without a cross-examination of witnesses. It is within the discretion of the Court whether to admit such findings. Paolitto v. John Brown E & C, Inc., 151 F.3d 60, 64 (2d Cir.

1998). Such findings will be considered here. Defendants' motion to strike on this ground is denied.

B. Summary Judgment Standard

Under Fed. R. Civ. P. 56(c), if the record taken as a whole reveals "no genuine issue as to any material fact . . . the moving party is entitled to judgment as a matter of law." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 585-86 (1986); Distasio v. Perkin Elmer Corp., 157 F.3d 55, 61 (1998). The burden to demonstrate that no genuine issue of material fact exists falls solely on the moving party. FDIC v. Giammettei, 34 F.3d 51, 54 (2d Cir. 1994); see also Heyman v. Commerce & Indus. Ins. Co., 524 F.2d 1317, 1320 (2d Cir. 1975). Once the moving party has provided sufficient evidence to support a motion for summary judgment, the opposing party must "set forth specific facts showing that there is a genuine issue for trial" and cannot rest on "mere allegations or denials" of the facts asserted by the movant. Fed. R. Civ. P. 56(e); accord Rexnord Holdings, Inc. v. Bidermann, 21 F.3d 522, 525-26 (2d Cir. 1994). The trial court must resolve all ambiguities and draw all reasonable inferences in favor of the non-movant. American Cas. Co. of Reading, Pa. v. Nordic Leasing, Inc., 42 F.3d 725, 728 (2d Cir. 1994); see also Eastway Constr. Corp. v. City of New York, 762 F.2d 243, 249 (2d Cir. 1985). However, "the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986).

C. Defendants' Motion for Partial Summary Judgment

1. Law

O'Shea contends that she was terminated in retaliation for opposing defendants' policy and practice of not hiring males to work in the toddler room. Specifically, O'Shea contends that after she hired Murray, defendants retaliated by giving O'Shea unattainable enrollment goals. O'Shea further contends that after she hired Bryant, defendants terminated her employment. See Am. Compl. at ¶¶ 25-29 (Counts I and II under Title VII), 32-35 (Counts IV and V under state law).

Under Title VII, it is improper for an "employing office" to "retaliate against an employee for opposing an employment practice that [is prohibited]." Brown v. County of Oneida, No. 99-CV-1064, 2000 WL 1499343, at *8 (N.D.N.Y. Sept. 28, 2000) (Munson, J.). To establish a prima facie case, an employee must show that (1) she opposed a prohibited employment practice, (2) the employing office was aware of that activity, (3) she suffered an adverse employment action, and (4) there was "'a causal connection between the protected activity and the adverse action.'" Holtz v. Rockefeller & Co., Inc., 258 F.3d 62, 79 (2d Cir. 2001) (quoting Galdieri-Ambrosini v. Nat'l Realty & Dev. Corp., 136 F.3d 276, 292 (2d Cir. 1998)). The analysis of these claims is the same under both federal and New York law. Reed v. A.W. Lawrence & Co., Inc., 95 F.3d 1170, 1177 (2d Cir. 1996).

1. Non-Employee

Defendants contend that O'Shea cannot sustain a retaliation claim because opposing the discriminatory policy of a non-employee is not a protected activity under Title VII.

Specifically, defendants contend that O'Shea cannot use her opposition to a customer's dissatisfaction with having a male employee to support a retaliation claim.

To establish a Title VII claim, an employee must show that his or her opposition was directed at the employer's unlawful employment practice and not a private citizen's discriminatory act. Wimmer v. Suffolk County Police, 176 F.3d 125, 135 (2d Cir. 1999). "[A] retaliation [claim] is not cognizable under Title VII" when the employee's "opposition was not directed at an unlawful *employment practice* of his [or her] employee." Id. In Wimmer, the court found that the plaintiff police officer failed to raise a claim under Title VII for discriminatory acts committed by his colleagues against the public because he was not challenging a practice of his employer. Id. Specifically, the court held that the plaintiff had failed to show that "there was unlawful discrimination with respect to the terms and conditions of employment or that his colleagues acted in a discriminatory manner towards himself or any other employee. Id.

Here, a parent advised O'Shea and Cleavenger that she was withdrawing her child from Childtime because there was a male teacher. O'Shea Dep. at 107; Cleavenger Dep. at 60. O'Shea defended having a male teacher to the parent. O'Shea Dep. at 107. Cleavenger was apprised of the situation and did not tell O'Shea to fire the male teacher. O'Shea Dep. at 112-14. Cleavenger did ask O'Shea to apologize to the parent and to attempt to persuade her to bring the child back. O'Shea Dep. at 114. Viewed in isolation, this incident would not suffice to establish a basis for O'Shea's claims of discrimination and retaliation. However, viewed in context with the other events alleged by O'Shea and viewing the evidence in the light most favorable to O'Shea, Cleavenger's response to the parent's complaints provides some evidence that by appeasing the parent and reprimanding O'Shea,

Cleavenger and Childtime agreed with the discriminatory position voiced by the parent. Thus, because O'Shea's claims do not rest solely on the parent's statement of her views, defendants' motion for summary judgment on this ground must be denied.

2. Prima Facie Case

Defendants contend that O'Shea did not establish a prima facie case because there is no evidence that defendants engaged in a prohibited employment practice.

A showing that the employee had a good faith reasonable belief that he or she was opposing an unlawful employment practice suffices to establish a prima facie case of discrimination and retaliation. McMenemy v. City of Rochester, 241 F.3d 279, 283 (2d Cir. 2001). Here, there is sufficient evidence to raise a question of material fact whether Childtime had an unlawful employment practice of not hiring males to work in the toddler room. Cleavenger and Ludwig both said that they frowned on and were uncomfortable hiring male employees for the toddler room. Ludwig stated that it was a lawsuit waiting to happen. O'Shea Dep. at 22. Ludwig asked a center director to transfer a male employee out of the toddler room. Boehm Decl. at ¶ 2. Cleavenger told O'Shea's assistant to tell Bryant that the opening in the toddler room was filled even though this was untrue. Charbonneau Decl. at ¶¶ 3-4. Cleavenger told O'Shea that she was uncomfortable hiring a male teacher for the toddler room, especially after O'Shea's incident with the parent. Leahy Decl. at Ex. 23, 5-6.

Furthermore, sometime after November 12, 1999, O'Shea wrote a letter to Cleavenger stating that company policy and state law prohibited the selection of teachers based on gender in response to the parent's complaint about a male teacher. Pl. Ex. 18. O'Shea hired Bryant for the toddler room position. Resila Aff. at Ex. O. Although Cleavenger did not

directly oppose O'Shea's hiring a male, this fact alone does not conclusively refute that O'Shea possessed a good faith reasonable belief that she was opposing a discriminatory hiring policy. See McMenemy, 241 F.3d at 283 (stating that the opposed employment practice need not result in a Title VII violation to establish a prima facie case of retaliation).

A reasonable juror could find that O'Shea believed that she was opposing an unlawful employment practice. Defendants' motion for summary judgment on this ground is denied.

D. O'Shea's Cross-Motion for Summary Judgment

On O'Shea's cross-motion, the evidence must be viewed in the light most favorable to defendants as the non-movants. See Ertman, 165 F.3d at 206. For the following reasons, O'Shea's cross-motion for summary judgment is granted in part and denied in part.

1. Retaliation

O'Shea contends that when she hired a male teacher, defendants first gave her an unattainable enrollment goal and, when she hired a second male teacher, she was terminated from her position. The applicable law is described above. See Section II(C)(1) supra.

O'Shea hired both Murray and Bryant for teacher positions at the Clifton Park center. Cleavenger approved both male employees' payroll. O'Shea Dep. at 106, Resila Aff. at Ex. O. When O'Shea returned from vacation, Cleavenger thought that Charbonneau had already hired Bryant. Leahy Decl. at Ex. 23, 5. Cleavenger did not tell O'Shea to fire or remove either man from their positions. O'Shea Dep. 103, 146, 151. Both men remained

employees with Childtime after O'Shea was terminated. O'Shea Dep. at 115, 150. This suffices to present a question of material fact whether a discriminatory practice existed and whether O'Shea reasonably perceived the existence of such a policy. O'Shea's cross-motion for summary judgment on this ground is denied.

2. COBRA

O'Shea contends that after her termination she was not notified of her right to continue her health insurance under COBRA.

Under COBRA, after a qualifying event an employer must notify an employee of his or her right to elect to continue health insurance coverage for eighteen months. 29 U.S.C. §§ 1161, 1162(2)(A)(i) (1999); Gigliotti v. Sprint Spectrum, L.P., No. 00-CV-217, 2001 WL 1717305, at *5 (N.D.N.Y. Dec. 7, 2001) (Scullin, C.J.). Termination of employment is a qualifying event if the termination was not for gross misconduct. 29 U.S.C. § 1163(2). The employer must provide notice of the right to elect within fourteen days after termination. 29 U.S.C. §§ 1166(a)(4)(A), (c). The employee then has sixty days to elect to continue participating in the health care plan. 29 U.S.C. § 1165(1). Defendants do not dispute that they failed to give O'Shea the notice required by COBRA.

If, as here, no notice is provided, the court may in its discretion award up to $100 per day from the date of failure to provide timely notice. 29 U.S.C. § 1132(c)(1). The language of § 1132(c)(1) makes evident that an award of statutory damages for a failure to give notice is discretionary with the court, not mandatory. See Gigliotti, 2001 WL 1717305, at *6 (denying statutory damages where plaintiff allowed to elect coverage three months after and

relating back to date of termination notwithstanding defendant's untimely notice under COBRA). The purposes of this award are both deterrence and compensation. Chestnut v. Montgomery, 307 F.3d 698, 704 (8th Cir. 2002); Scott v. Suncoast Beverage Sales, Ltd., 295 F.3d 1223, 1232 (11th Cir. 2002); Teen Help, Inc. v. Operating Eng'r Health & Welfare Trust Fund, No. 98-CV-2084, 1999 WL 1069756, at *5 (N.D. Cal. Aug. 24, 1999); but see Partridge v. HIP of Greater N.Y., No. 97-CV-453, 2000 WL 827299, at *6 (S.D.N.Y. June 26, 2000) (holding that plaintiff was not entitled to any award in the absence of prejudice); Rinaldo v. Grand Union, No. 89-CV-3850, 1995 WL 116418, at *2-3 (E.D.N.Y. Mar. 8, 1995) (stating that it would be disinclined to award statutory damages under COBRA where plaintiff was not harmed). Prejudice and bad faith are factors to consider in determining damages. Brooks v. North American Phillips Corp., 142 F. Supp. 2d 407, 413 (W.D.N.Y. 2001); Goodman v. Comm. Labor Srvs., Inc., No. 98-CV-1816, 2000 WL 151997, at *4 (N.D.N.Y. Feb. 11, 2000) (Hurd, J.).

O'Shea's employment was terminated on December 16, 1999. Thus, notice of O'Shea's rights under COBRA was required to be given on or before December 30, 1999. 29 U.S.C. § 1161. O'Shea remained without health insurance coverage until she obtained new employment commencing on February 15, 2000. Pl. Ex. 29 at ¶ 4. During this time period, O'Shea was diagnosed with and treated three times for a gastrointestinal disorder for which she was without insurance coverage. Pl. Ex.29. Thus, O'Shea was prejudiced by defendants' failure to provide the required notice.[3] Both because O'Shea suffered prejudice from defendants' failure to give the required notice and given the interest in deterring

[3]The record does not indicate the total medical costs incurred by O'Shea in this period.

defendants and others from failing to give such notice in the future, an award of statutory damages is appropriate in the circumstances of this case for the forty-six day period between December 31, 1999, the first day after defendants' time for giving notice lapsed, and February 14, 2000, the last day O'Shea was without coverage before commencing new coverage at her new job.

Other courts have awarded statutory damages for comparable COBRA violations in the range of $45-$55 per day. See, e.g., Holford v. Exhibit Design Consultants, 218 F. Supp. 2d 901, 909 (W.D. Mich. 2002) (awarding $55 a day); Torres-Negron v. Ramallo Bros. Printing, Inc., 203 F. Supp. 2d 120, 122 (D. Puerto Rico 2002) (awarding $45 a day); Garred v. Gen. Am. Life Ins. Co., 774 F. Supp. 1190, 1201 (W.D. Ark. 1991) (awarding $50 a day); Thomas v. Jeep Eagle Corp., 746 F. Supp. 863, 864 (E.D. Wis. 1990) (same). An award is appropriate here of $50 per day for the forty-six day period, or a total of $2,300.[4]

O'Shea's cross-motion for summary judgment for her COBRA claim is granted.

III. Conclusion

For the reasons stated above, it is hereby

ORDERED that:

1. Defendants' motions to strike (Docket No. 25) is **GRANTED** as to O'Shea's exhibits three through fourteen and is **DENIED** in all other respects;

2. Defendants' motion for partial summary judgment (Docket Nos. 18-22) is

[4]At oral argument, O'Shea also requested an award of costs and attorney's fees on this claim. O'Shea is granted leave to move for such an award within thirty days after judgment is entered on the remaining causes of action in this case.

DENIED; and

3. O'Shea's cross-motion for summary judgment (Docket Nos. 22-24) is:

A. **GRANTED** as to O'Shea's third cause of action under COBRA and O'Shea is granted judgment against defendants in the amount of $2,300.00; and

B. **DENIED** in all other respects.

IT IS SO ORDERED.

Dated: December 2, 2002
Albany, New York

UNITED STATES MAGISTRATE JUDGE